

(4)  
No. 88-217

Supreme Court, U.S.  
**FILED**

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JOSEPH E. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

INTERSTATE COMMERCE COMMISSION,  
*Petitioner,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit

BRIEF OF RESPONDENT  
THE PITTSBURGH & LAKE ERIE RAILROAD  
COMPANY  
IN RESPONSE TO THE PETITION

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Date: September 20, 1988



On August 8, 1988, the Interstate Commerce Commission ("ICC") filed a petition with this Court for a writ of certiorari to review the decision of the United States Court of Appeals in *Railway Labor Executives' Association v. Pittsburgh & Lake Erie Railroad Co.*, 845 F.2d 420 (3d Cir. 1988) ("*P&LE II*"). Respondent The Pittsburgh & Lake Erie Railroad Company ("P&LE") supports the petition sought by the ICC and respectfully suggests that the Court consolidate the petition in this case with the petitions filed by P&LE in *P&LE I* (No. 87-1589) and *P&LE II* (No. 87-1888). In so doing, the Court will be able to render a decision on the important issues involved as early as possible in the October Term, 1988.

For the reasons stated in P&LE's own petitions to this Court, P&LE agrees with the ICC that the issues presented by *P&LE I* and *P&LE II* are of paramount importance to the entire rail industry. The questions regarding the proper relationship between Sections 10505 and 10901 of the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 10505, 10901, Section 6 of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, and Section 4 of the Norris-La Guardia Act ("NLGA"), 29 U.S.C. § 104, are in urgent need of resolution. As the ICC states in its petition, a proper resolution of these issues by the Court during its next term is of "quintessential importance." ICC Petition at 18. While the ICC has previously asserted that consideration of *P&LE I* and *P&LE II* should be deferred until *Burlington Northern Railroad Co. v. United Transportation Union*, 848 F.2d 856 (8th Cir. 1988), petition for reh'g en banc denied (Sept. 16, 1988), reaches this Court, the ICC now recognizes

that the "devastating" impact of the Third Circuit's decision dictates immediate consideration of P&LE's case by the Court. Of course, P&LE, which, unlike the ICC, is not underwritten by the taxpayer, has always urged expeditious consideration of its circumstances.

P&LE notes that the ICC focuses on the need to accommodate the RLA and NLGA to the ICA. P&LE agrees. However, as explained in P&LE's petition in *P&LE II* (No. 87-1888), if the Court agrees the principles of *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965), apply in the RLA context, then the conflict between the ICA and the RLA is eliminated or significantly diminished. The Court there held that an employer has no duty to bargain over the decision to go out of business.

Additionally, there is also the continuing need for this Court to give guidance to the lower courts given the events that have occurred since the Third Circuit's decision in *P&LE II*. As the Court has previously been advised, the Eighth and Fifth Circuits have split on whether *P&LE II* was correctly decided. Compare *Railway Labor Executives' Association v. City of Galveston*, 849 F.2d 145 (5th Cir. 1988) with *Burlington Northern*, *supra*, 848 F.2d at 856 and *Railway Labor Executives' Association v. Chicago & Northwestern Transportation Co.*, 848 F.2d 102 (8th Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3881 (U.S. June 14, 1988) (No. 87-2049). This disagreement is also found in recent District Court decisions. In *Burlington Northern Railroad Co. v. United Transportation Union*, No. 88 C 2687 (N.D. Ill. June 13, 1988) (LEXIS, Genfed library, Dist file), *appeal pending*, No. 88-2180 (7th Cir. argued Sept. 9, 1988), the court

held that the RLA's bargaining provisions still had effect despite the fact the transaction had been authorized by the ICC. Conversely, in *Railway Labor Executives' Association v. Soo Line Railroad Co.*, No. 87 C 5293 (N.D. Ill. July 19, 1988) (LEXIS, Genfed library, Dist file), another judge in the same court found that the ICA superceded the RLA.

For the reasons set forth herein and in its previous petitions for a writ of certiorari, P&LE respectfully urges that this petition for certiorari be granted and consolidated with those in No. 87-1589 and No. 87-1888, and the matter heard as soon as possible in the new term.

Respectfully submitted,

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